IN THE SUPREME COURT OF IOWA

STATE OF IOWA	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Supreme Court No. 15-1560
	)	
STEPHEN ROBERT JONAS,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HONORABLE PAUL D. SCOTT, JUDGE

APPELLANT'S BRIEF AND ARGUMENT

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CERTIFICATE OF SERVICE

On the 14th day of September, 2016, the undersigned certifies that a true copy of the forgoing instrument was served upon the Defendant-Appellant by placing on copy thereof in the United States mail, proper postage attached, addressed to Stephen Robert Jonas, No. 6873223, Fort Dodge Correctional Facility, 1550 L St., Fort Dodge, IA 50501.

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the argument raised in Division I urges this Court to overrule prior case law and address a legal question about an evolving and fluctuating area of law and an issue of broad public importance. Iowa R. App. P. 6.903(2)(d), 6.1101(2)(d), (f). Specifically, Division I asks this Court to overrule State v. Neuendorf, 509 N.W.2d 743 (Iowa 1993) and return to the previously longstanding rule under State v. Beckwith, 46 N.W.2d 20 (Iowa 1951) and State v. Reed, 208 N.W. 308 (Iowa 1926) that prejudice is presumed when a defendant is forced to use a peremptory strike against a prospective juror that the district court should have struck for cause.

STATEMENT OF THE CASE

Nature of Case. Defendant-Appellant, Stephen Robert Jonas, appeals from the judgment, conviction, and sentence for Murder in the Second Degree in violation of Iowa Code sections 707.1 and 707.3 (2013) following a jury trial and verdict of guilty in the Polk County District Court. The Honorable Paul D. Scott presided over all relevant proceedings.

Course of Proceedings. On September 30, 2014, the State filed a trial information charging defendant with the offense of Murder in the First Degree, a class A felony, in violation of Iowa Code sections 707.1, 707.2(1) and 707.2(2) (2013). (Trial Information) (App. pp. 4-5).

On March 11, 2015, defendant filed a Notice of Defenses indicating that he will rely on the affirmative defenses of Justification. (Notice of Self Defense) (App. p. 6).

Jury trial commenced on July 2, 2015. (Cover). The jury found defendant guilty of the lesser included offense of Murder in the Second Degree. (Verdict Forms) (App. pp. 20-22).

Sentencing hearing commenced September 9, 2015. (Sentencing Order) (App. pp. 29-31). On the charge of Murder in the Second Degree, the court ordered defendant to serve an indeterminate term of imprisonment not to exceed fifty years and a mandatory minimum sentence of seventy percent before becoming eligible for parole pursuant to section 902.12. (Sentencing Order) (App. pp. 29-31). The court also ordered to pay restitution to the victim's estate in the amount of

$150,000 pursuant to section 901.3B. (Sentencing Order) (App. pp. 29-31).

Defendant filed Notice of Appeal on September 15, 2015. (Notice of Appeal) (App. p. 32).

Background Facts. Stephen Jonas moved to Iowa from Milwaukee in 2012. (Tr. p. 1347 Line 16 – 1348 Line 2). Stephen is a divorced father who worked as a loan administration manager. (Tr. p. 1349 Lines 1-7). Stephen had resigned from his job in August of 2014 and planned on returning to Milwaukee. (Tr. p. 1357 Line 3 – p. 1359 Line 4).

Stephen frequented a bar named Tapz located near his home. (Tr. p. 1360 Line 2 – p. 1363 Line 1). Stephen went to Tapz on August 16, 2014, and stayed until closing time. (Tr. p. 1363 Line 25 - p. 1364 Line 21). Stephen knew Zachery Paulsen as a regular at the bar. (Tr. p. 1364 Line 22 - p. 1365 Lines 14). Stephen was sitting with Zachery and Keith Toye. (Tr. p. 1368 Line 16 - p. 1369 Line 12). Zachery invited Stephen and Keith to his family construction business. (Tr. p. 1368 Line 16 - 1369 Line 24). Stephen went home to get some

beers and then drove to the business. (Tr. p. 1368 Line 16 – p. 1369 Line 12).

Zachery and Keith were at the business when Stephen arrived. (Tr. p. 1369 Line 25 - p. 1371 Line 6). Zachery gave them a tour of the business while they drank the beers. (Tr. p. 1370 Line 20 – p. 1371 Line 17). The three men were at the business for about forty-five minutes to an hour. (Tr. p. 1372 Line 4 – p. 1373 Line 2).

Keith left shortly before Stephen. (Tr. p. 1374 Line 3 - 23). As Stephen was saying good bye, Zachery pulled Stephen in close and they embraced. (Tr. p. 1374 Line 3 - p. 1375 Line 22). Stephen nibbled and kissed Zachery's neck for thirty to forty-five seconds. (Tr. p. 1375 Lines 11-22). Stephen was surprised and said "wow". (Tr. p. 1375 Line 23 – p. 1376 Line 3). Zachery did not push Stephen away or say anything. (Tr. p. 1376 Lines 4-14).

They exchanged phone numbers and Stephen asked Zachery if he was going to Tapz the following evening. (Tr. p. 1376 Line 21 - p. 1377 Line 10). Stephen was looking for companionship and was delighted and excited by his

encounter with Zachery. (Tr. p. 1378 Line 21 – p. 1380 Line 8). They made plans to meet up at Tapz the following evening. (Tr. p. 1381 Line 22 - p. 1382 Line 8).

Stephen went to Tapz the following evening but Zachery was not there. (Tr. p. 1383 Lines 9-18). Stephen had a quick drink and left. (Tr. p. 1384 Line 22 - p. 1385 Line 5). Stephen returned to the bar around closing time and Zachery was again not there. (Tr. p. 1385 Lines 10-19).

Stephen sent a text message to Zachery the next day. (Tr. p. 1385 Line 23 – p. 1386 Line 14). Zachery replied asking, "Who's this". (Tr. p. 1386 Lines 15-16). Stephen replied that they should move on and get over it. (Tr. p. 1386 Lines 17-23). Some of Zachery's acquaintances testified that Zachery was upset about what had occurred with Stephen. (Tr. p. 725 Lines 13-25, Tr. p. 751 Line 11 - p. 752 Line 23, Tr. p. 780 Line 5 – p. 781 Line 13, Tr. p. 902 Line 10 – p. 905 Line 22). Zachery told one of his friends that if Stephen ever hit on him again that he would beat his ass. (Tr. p. 914 Lines 3-17).

The next Friday, Stephen went to Tapz. (Tr. p. 1392 Lines 5-24). Stephen asked Zachery what was going on and Zachery said nothing was going on. (Tr. p. 1392 Lines 5-24). Stephen received no indication from Zachery that he was upset with Stephen. (Tr. p. 1395 Lines 3-16).

Stephen had been drinking before he went to Tapz and had up to six more mixed drinks at Tapz over a two-hour period. (Tr. p. 1395 Line 25 - p. 1396 Line 20). Stephen testified that he was intoxicated and that he had an alcohol problem. (Tr. p. 1396 Lines 19-20). Zachery also appeared to be intoxicated according to Stephen. (Tr. p. 1396 Lines 21-23).

Stephen stayed at the bar until closing time. (Tr. p. 1395 Lines 17-24). Stephen went home, grabbed a couple of beers and headed to the Paulsen's construction company. (Tr. p. 1397 Lines 3-5). Stephen was leaving for Milwaukee that next weekend and wanted to speak with Zachery about what had happened to previous weekend. (Tr. p. 1405 Lines 3-23).

Stephen arrived at the Paulsen's business telling Zachery that he had brought some beer and wanted to party. (Tr. p.

1407 Lines 7-24). Zachery showed Stephen a tool chest while they drank beer and listened to music. (Tr. p. 1409 Lines 4-11). Stephen suggested that they go out in the back of the business for a smoke. (Tr. p. 1410 Lines 12-21). As Stephen was leaving the garage to get cigarettes from his truck, he saw Zachery slide a hammer into his pocket. (Tr. p. 1410 Line 22 – p. 1411 Line 5).

Stephen did not feel threatened by Zachery's action, but did feel concerned and alarmed. (Tr. p. 1413 Lines 1-24). As Stephen was retrieving his cigarettes from his vehicle, he lifted the console between his front seats and saw a knife that he had bought the week before. (Tr. p. 1413 Line 1 – p. 1415 Line 22). Stephen grabbed the knife for his safety and also to show it to Zachery. (Tr. p. 1415 Lines 13-22).

Stephen approached Zachery who was standing near a trailer located in the back of the property. (Tr. p. 1417 Lines 14-24). Stephen stepped toward Zachery when Zachery struck Stephen on the chin with the hammer. (Tr. p. 1418 Line 12 - p. 1420 Lines 21). Stephen fell backwards while Zachery came at him again. (Tr. p. 1420 Line 16 - p. 1421 Line 17).

Realizing that he could not escape and fearing that he would die, Stephen took the knife out of his pocket and used it on Zachery. (Tr. p. 1421 Line 19 - p. 1425 Line 8). Zachery continued to swing the hammer toward Stephen who used the knife to fight off Zachery. (Tr. p. 1424 Line 2 – 1430 Line 24).

Stephen and Zachery fell on to the trailer where the struggle ended. (Tr. p. 1430 Line 25 - p. 1431 Line 15). Stephen stood up and told Zachery that he was going to call an ambulance. (Tr. p. 1432 Line 4 – p. 1433 Line 25). Stephen heard Zachery moan. (Tr. p. 1438 Lines 1-6). Stephen panicked, did not call an ambulance, and went home. (Tr. p. 1432 Line 4 – p. 1433 Line 25).

Stephen showered when he got home. (Tr. p. 1434 Lines 1-24). There were bruises all over his arms, legs and chest. (Tr. p. 1434 Lines 1-24). Stephen slept for a few hours. (Tr. p. 1434 Line 25 - p. 1435 Line 5). Later on, Stephen disposed of the clothes he was wearing during the struggle by throwing them from his vehicle's window into an empty field. (Tr. p. 1435 Line 6 – p. 1436 Line 8). Stephen also threw the knife into a river. (Tr. p. 816 Lines 11-20).

Zachery's body was found in the morning along a fence in the back of the property. (Tr. p. 540 Lines 3-17). A 911 call was made and the police arrived. (Tr. p. 554 Line 13 - p. 556 Line 18). Zachery was deceased and the area was wet from rain. (Tr. p. 597 Line 12 – p. 598 Line 6). Zachery had lacerations to his hand, face, neck, abdomen and chest. (Tr. p. 598 Lines 7-11). There was a large pool of blood behind the trailer. (Tr. p. 598 Lines 7-11). A cell phone and ball-peen hammer were on the trailer. (Tr. p. 598 Line 12 - p. 599 Line 6).

Stephen was interviewed by law enforcement later in the day. (Tr. p. 1437 Lines 10-25). Stephen denied having any knowledge of Zachery's death. (Tr. p. 1437 Line 10 – p. 1438 25). Stephen was interviewed by law enforcement a second time the following day wherein he told them what had happened with Zachery. (Tr. p. 1438 Line 16 - p. 1439 Line 24).

Zachery sustained twenty stab wounds and 15 incised wounds. (Tr. p. 1225 Lines 15-19). A majority of the stab and incised wounds were superficial. (Tr. p. 1245 Line 10 – p.

1246 Line 19). Zachery also had several small bruises and scrapes. (Tr. p. 1225 Lines 15-19). The cause of Zachery's death was determined to be multiple stab and incised wounds. (Tr. p. 1240 Lines 15-22). Zachery's blood alcohol level was .156 mg/dl. (Tr. p. 1240 Lines 1-8).

Additional pertinent facts will be discussed below.

ARGUMENT

I. THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO STRIKE A POTENTIAL JUROR FOR CAUSE.

A. Error Preservation:

To preserve error of a district court's ruling on for-cause challenges to prospective jurors, trial counsel must challenge the juror and articulate the specific grounds for the challenge, and the district court must rule on the challenge. See State v. Tillman, 514 N.W.2d 105, 108 (Iowa 1994). Error was preserved by defendant's motion to strike for cause. (Tr. p. 153 Line 10 – p. 162 Line 9).

B. Standard of Review:

Appellate courts review a district court's ruling on for-cause challenges to prospective jurors for abuse of discretion.

Tillman, 514 N.W.2d at107. Appellate courts "give broad discretion to the [district] court in its ruling on such challenges." State v. Mitchell, 573 N.W.2d 239, 239–40 (Iowa 1997).

C. Discussion

During voir dire, trial counsel challenged for cause a potential juror on the grounds that the juror could not be fair and impartial toward the defendant. (Tr. p. 161 Lines 10-20). The district court denied trial counsel's motion. (Tr. p. 162 Lines 1-9). While the prospective juror did not ultimately end up on the final jury, both remained on the jury panel and trial counsel was forced to use a peremptory strike to remove the juror from the panel. (Panel Selection Report) (App. pp. 7-15). The district court erred in overruling trial counsel's for-cause challenges to this juror, and this Court should hold that under these circumstances, prejudice is presumed and that Stephen Jonas should receive a new trial.

Iowa Rule of Criminal Procedure 2.18 (2015) generally details the process of selecting prospective jurors from the jury panel during voir dire. Specifically, Rule 2.18(5)(k) provides

that a prospective juror may be struck for cause when it appears a prospective juror has "formed or expressed such an opinion as to the guilt or innocence of the defendant as would prevent the juror from rendering a true verdict upon the evidence submitted on the trial."

In State v. Neuendorf, the Iowa Supreme Court overturned decades of precedent in declaring that "[p]rejudice will no longer be presumed from the fact that the defendant has been forced to waste a peremptory challenge." Neuendorf, 509 N.W.2d 743, 747 (Iowa 1993). In so doing, the court overruled State v. Beckwith, 46 N.W.2d 20 (Iowa 1951) and State v. Reed, 208 N.W. 308 (Iowa 1926). See State v. Mootz, 808 N.W.2d 207, 226 (Iowa 2012) (Wiggins, J., concurring specially).

In the instant case, the district court should have sustained trial counsel's for-cause challenge and defendant entreats this Court to overrule Neuendorf and find that the district court's overruling trial counsel's challenge caused structural error. Error which resulted in presumptive

prejudice since trial counsel was forced to excuse this juror through the use of a peremptory strike.

During individual voir dire, the following examination occurred:

> THE COURT: Good morning, Mr. Stagner. Go ahead and have a seat.
>
> . . .
>
> (Voir Dire by the State)
>
> Q. it is a murder case. You think if you are selected as a juror you would be fair and impartial?
>
> A. I would try to be fair and impartial.
>
> Q. And I notice on question 17, it's about the defendant in this case being gay, would this influence your ability to be fair and impartial? You understand he's not being prosecuted because he's gay?
>
> A. Oh, I understand that, yes.
>
> Q. So do you think you could listen to the evidence and make that decision based on the evidence and the Court's instructions?
>
> A. I could, yes, yes.
>
> Q. Okay. Because we don't want decisions made on anything other than that evidence that comes in from the witness stand and, you know, following the Court's instructions. So you could do that; is that right?
>
> A. I think so, yes.
>
> . . .
>
> (Voir Dire by Defendant)

Q. In this case you have already been informed that Mr. Jonas identifies as gay.

A. Uh-huh.

Q. Do you understand?

A. Yes, sir.

Q. Now, in answer to No. 17, question No. 17, you were asked when you were informed that the defendant was gay – the specific question is, would this in any way affect your ability to be fair and impartial if you were selected? And you said yes. You agree that fact is going to affect your ability to be fair?

A. Somewhere in the back of my mind something would come up. I just – I'm just being honest with you, yes.

Q. No, that's what we want and we appreciate it, because we want to find jurors that are qualified for this case. And you may be an excellent juror for any other case, but you may not be the right type of juror for this case. Do you understand?

A. Yes, sir.

Q. And that's what we are trying to find out. So is it fair to say that you are not going to be able to give Mr. Jonas a fair trial because of that?

A. I would say that young man would probably do better without me on the jury, just to be honest with you. I would try to be fair. I'm 50 years old and I would try to be fair, but he probably would have better jury selection than myself.

Q. Because is that a factor you will not be able to exclude?

A. I don't know if I would be able to. I would try to exclude it, but you know somewhere in the back something is going to come up. I guess.

Q. So if I can restate what you told us, it would not be fair to Mr. Jonas to have you in the jury –

A. Correct –

Q. – because of the fact you could not be completely fair and impartial?

A. It would come – yes, yes.

MR. RODRIGUEZ: I don't have any other questions.

VOIR DIRE EXAMINATION

BY MR. SARCONE:

Q. Are you telling me you couldn't listen to the circumstantial evidence and make a decision based on the evidence?

A. Again, I would sit there and somewhere along the way something would come up in the back of my mind. I will try. Honestly I will try that, but the young man would probably do better with someone else.

Q. Have you formed an opinion now as guilt or innocence?

A. I have not, no, sir.

Q. And, you know, you have served on a jury before. You know that the State has the burden of proof

and that you're supposed to make your decisions based solely on the evidence and the judge's instructions. I'm just saying, can you do that? I know you have personal feelings. Can you set those aside and make a decision based on that?

A. Again, I would try, but I'm sure there would be something that would come up.

Q. You don't know what that would be?

A. Yeah. I – again I'm 50 years old. I work with truckers and guys in oil refineries and in oil wells. It's just permeated in my life. So I will try to be honest and fair, but again, there would be something that would come up. I'm just being honest.

MR. SARCONE: I don't have any other questions.

VOIR DIRE EXAMINATION

BY THE COURT:

Q. When you say there is going to be something that comes up, what do you mean by that?

A. You know, in the back of my mind, and I don't want to insult anybody here, I just would – I don't know. I would think I will try to be honest, but then again I would like, oh, well. And I can't explain it exactly.

Q. My questions for you is this: Does the fact that the defendant, Mr. Jonas, has identified himself as a gay man, does that fact alone cause you to be biased or prejudice against him in determining whether or not he's guilty or innocent in this case?

A. Again, I don't think it would be determined whether he was guilty or innocent, but I would still have a bias there some place, yes.

Q. Okay. So are you – if I instruct you as to what the law is, are you going to be able to follow what the law says?

A. Yes.

Q. Are you – does the fact that the defendant, again, is gay, does that cause you to not be able to listen to the evidence and keep an open mind with respect to the guilty or not guilty, the facts of this case? Do you understand the question? That was a little bit –

A. I understand that, you know, again the facts are going to be the facts and my – and that's what we will hear and that's what we will determine. But, again, somewhere down in the –

Q. Well, the law doesn't require that you forget the fact that Mr. Jonas is gay, so that's why I'm concerned about the fact that you are telling us that there is something that might pop up in the back of your head. You don't have to forget the fact that he has identified as being gay.

Is that what you are telling the Court is that you are not going to be able to forget the fact that he's gay. Or do you think that the fact he's gay means that more likely than not that he – that you are not going to be able to give him a fair trial.

A. I think, again, the gentleman would probably do better without me on the jury. I think there could be something in the back of my mind that would – again, I'd listen to the facts. I would try my best, but it's who we are.

THE COURT: Okay. All right. Mr. Sarcone, any additional questions?

MR. SARCONE: No, Your Honor.

THE COURT: Mr. Rodriguez?

MR. RODRIGUIZ: Yes.

VOIR DIRE EXAMINATION

BY MR. RODRIGUIZ

Q. Mr. Stagner, is this – there will be this bias in the back of your mind?

A. I think there will be, yes, sir.

Q. And will it be stronger if you hear evidence of a sexual advance or something of that nature?

MR. SARCONE: Excuse me, Your Honor. I don't think that's a proper question for this witness.

THE COURT: Please rephrase your question.

Q. (By Mr. Rodriguez) Just hypothetically, does that bother you when there's a gay man approaching another?

A. Yes.

Q. Okay. And that's something that would affect your ability to be fair and impartial?

A. Again, it would bother me, yes.

. . .

THE COURT: Any—

MR. SARCONE: No, I think it's like the other witness, the one lady that sat here and said she's probably hold us to a higher standard or whatever. He may be better if without him, but that isn't a ground to excuse his as a juror at this point. I think there was a personal opinion, and then there is what the evidence is that's going to be presented, and following your instructions, and I think he would try to do that, Your Honor. I don't think there is a basis to get rid of him at this point.

MR. RODRIGUIZ: Judge, there is no question that this juror cannot be fair and impartial to Mr. Jonas because he is gay. He asserted that several times. And regardless of how he tried to rehabilitate him, the bottom line is that in the back of his mind he' always going to note – hold that against Mr. Jonas, the fact that he's gay. That disqualifies him as a juror in this case because he cannot be fair and impartial. It wouldn't be any different if we were trying a black person and he came and said racist comments with respect to black people.

THE COURT: Anything further?

MR. SARCONE: Pardon me?

THE COURT: Anything—

MR. SARCONE: No. He's no different than the other juror we had in here earlier.

THE COURT: Well, my problem is he has said that he's going to have it in the back of his mind and that the defendant would be better off not having him as a juror. After he said that, he still continues to express the opinion that he could be fair and unbiased and be able to try a fair case.

> And I just don't think that the record is there to strike him for cause at this point. So I'm going to allow Mr. Stagner to stay on the panel.

(Tr. p. 149 Line 8 – p. 162 Line 9).

The Court should be highly suspect of any rehabilitative efforts when a juror expresses reservations about the ability to be fair and impartial. Critics have found that rehabilitation only goes so far; jurors, wanting to please the tribunal when being questioned feverishly by two lawyers and a judge, are not the best predictors of their own impartiality. See Mary R. Rose & Shari Seidman Diamond, Judging Bias: Juror Confidence and Judicial Rulings on Challenges for Cause [hereinafter "Judging Bias"], 42 Law & Soc'y Rev. 513, 516 (Sept. 2008) ("The context of voir dire provides several reasons to be concerned about the quality of jurors' claims of fairness. For one thing, by design, voir dire questions often convey social desirability; that is, the questions suggest that it is 'better' to answer one way than another. . . . [I]ndividuals recognize that fairness is a desirable characteristic, and most people want to believe that they possess it."); Shari Seidman Diamond et al., Realistic Responses to the Limitations of

Batson v. Kentucky, 7 Cornell J.L. & Pub. Pol'y 77, 92 (1997) ("People are often unable to recognize the extent to which their experiences or attitudes affect their judgments."); Dov Fox, Neuro-Voir Dire and the Architecture of Bias, 65 Hastings L.J. 999, 1011 (2014) ("[S]imply asking jurors whether they can be impartial is not likely to reveal with any reliability the presence or strength of many of the outside influences that they would in fact bring to bear on the questions at trial."); Mark W. Bennett, Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions, 4 Harv. L. & Pol'y Rev. 149, 160 (2010) ("As a [federal] district court judge for over fifteen years, I cannot help but notice that jurors are all too likely to give me the answer that they think I want, and they almost uniformly answer that they can 'be fair.'"); Kurt F. Ellison, Comment, Getting Out of the Funk: How Wisconsin Courts Can Protect Against the Threat to Impartial Jury Trials, 96 Marq. L. Rev. 953, 979 (2013) ("[J]urors' statements of impartiality are often motivated by pressure from the judge . . . ."). Furthermore, judges may be more likely to be convinced

by jurors who confidently claim they are impartial. Judging Bias, 42 Law & Soc'y Rev. at 534–35.

Since the district court in the instant case erred in overruling trial counsel's for-cause challenge, this court should find that under Iowa Rule of Criminal Procedure 2.18(5) and (9), this constitutes structural error, prejudice is presumed, and reversal is required.

Under current Iowa law, to show prejudice resulting from the overruling of a for-cause challenge, a criminal defendant must show "(1) an error in the court's ruling on the challenge for cause; and (2) either (a) the challenged juror served on the jury, or (b) the remaining jury was biased as a result of the defendant's use of all of the peremptory challenges." Tillman, 514 N.W.2d 108. Because trial counsel ultimately struck juror Stagner by use of a peremptory strike, he did not serve on the actual jury. (Panel Selection Report) (App. pp. 7-15). Therefore, under the Neuendorf standard, defendant cannot show prejudice.

Iowa Rule of Criminal Procedure 2.18(9) provides that both the State and the defense are entitled to ten peremptory

strikes in a trial for a Class A felony. In 1926, the Iowa Supreme Court in State v. Reed declared that where a prospective juror is "clearly disqualified" from serving in the case at issue, but who is not struck for cause, "[t]he error is not cured by reason of the fact that [the defendant] exercised his peremptory challenge against the juror." Reed, 208 N.W. 308, 309 (Iowa 1926), overruled by Neuendorf, 509 N.W.2d at 747, as stated in Mootz, 808 N.W.2d at 222. Nearly thirty years later, the Iowa Supreme Court reaffirmed this principle in State v. Beckwith, declaring that a "[d]efendant should not be compelled to use his peremptory challenges upon prospective jurors who should have been excused for cause." Beckwith, 46 N.W.2d 20, 23 (Iowa 1951), overruled by Neuendorf, 509 N.W.2d at 74.

In 1993, the Iowa Supreme Court abruptly changed course on the issue of presumed prejudice due to the district court's erroneous overruling of a for-cause challenge. In Neuendorf, the court found that the district court erred in overruling defense counsel's for-cause challenge to a juror who had a preconceived notion about the case and whose bias was

not cured through rehabilitation by the court. Neuendorf, 509 N.W.2d at 745–46. The Neuendorf court, however, dispensed with the longstanding rule that prejudice is presumed when trial counsel is forced to use peremptory strikes on jurors who should have been struck for cause. Neuendorf, 509 N.W.2d at 746–47. The Neuendorf decision was grounded in the fact that because the challenged juror ultimately did not serve on the defendant's jury, the existence of prejudice was "too speculative to justify overturning the verdict of the jury on that basis alone." Id. at 746. Importantly, the court's decision did not explicitly rest in any constitutional or rule-based principle; the court appeared to simply be following a trend in the law, and recognized that its decision was not unconstitutional under federal law. Id. at 746–47.

The Neuendorf standard, however, mischaracterizes the purpose of peremptory challenges. The Neuendorf test is based on the lack of a violation of the federal Sixth and Fourteenth Amendment right to an impartial jury, evidenced by its insistence on a finding of actual juror bias to warrant reversal. See Neuendorf, 509 N.W.2d at 746–47. An impartial

jury, however, is not the only harm caused by such a rule; the Neuendorf court completely ignored the imbalance in favor of the State caused by the denial of meritorious strikes for cause and requiring defense counsel to needlessly exhaust its limited peremptory strikes under Rule 2.18(9) to cure an error of the district court. These are two distinct harms, only one of which is addressed by the Neuendorf test.

Peremptory strikes are never meant to be used to ensure that biased jurors do not end up on a jury; for-cause challenges serve that purpose. Rather, peremptory strikes enable both sides to strike jurors whose biases, prejudices, outlooks on life, or any other non-discriminatory reasons do *not* necessarily require elimination, but who the challenging party believes should nonetheless be struck. See Shane v. Com., 243 S.W.3d 336, 339 (Ky. 2007) ("By their very nature, peremptory challenges are not for cause; they can be for any reason whatsoever, except that the juror is a member of a protected class."). But requiring a defendant to bear the burden of curing the errors of the district court effectively reduces the number of peremptory strikes available to the

defense. See id. ("To shortchange a defendant in this manner is to effectively give the Commonwealth more peremptory challenges than the defendant."); *see also* The Supreme Court, 2008 Term – Leading Cases, Peremptory Challenges – Harmless Error Doctrine, 123 Harv. L. Rev. 212, 213, n. 6 (2009) (criticizing the Supreme Court for "upholding practices that effectively reduce" the number of available peremptory challenges for the defendant despite their pivotal importance to both parties in jury selection). In short, in this case the State was given ten peremptory challenges and the defense was in effect given nine.

This disparity of treatment between the two sides unfairly tips the balance of the adversarial proceeding in favor of the State by unduly limiting a defendant's ability to pick a jury it deems favorable on par with the State's ability to do so. Effectively decreasing the number of peremptory strikes available to the defense under these circumstances violates the spirit of Rule 2.18(9). As other courts have recognized, peremptory strikes play a crucial role in ensuring the due process right to a fair trial, even though they are not an

explicit constitutional guarantee. *See, e.g.*, Com. v. Green, 652 N.E.2d 572, 776 (Mass. 1995) ("[T]he purpose of peremptory challenges is to aid in assuring the constitutional right to a fair and impartial jury."). "[T]hough not a trial tool of constitutional magnitude, peremptory challenges are a mainstay in a litigant's strategic arsenal." People v. Hecker, 942 N.E.2d 248, 272 (N.Y. 2010) (internal quotation marks omitted).

Effectively reducing the number of peremptory challenges available to a defendant amounts to structural, or plain, error. While Iowa courts rarely apply a plain error standard, it is necessary here where the errors "involve defects 'affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" State v. Feregrino, 756 N.W.2d 700, 707 (Iowa 2008) (quoting Johnson v. U.S., 520 U.S. 461, 468, 117 S.Ct. 1544, 1549, 137 L.Ed.2d 718, 728 (1997) (internal quotation marks omitted)). The district court's error undermines the integrity of the criminal justice system and enshrines in the framework of the proceeding a procedural defect that denies defense counsel the full and

effective use of peremptory strikes. Where "the criminal adversary process itself is 'presumptively unreliable,'" prejudice should be presumed. Lado v. State, 804 N.W.2d 248, 252 (Iowa 2011).

The United States Supreme Court has described structural error requiring automatic reversal as error that "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Washington v. Recuenco, 548 U.S. 212, 218–19, 126 S.Ct. 2546, 2551, 165 L.Ed.2d 466 (2006). Other courts have explicitly recognized that the outright denial of peremptory challenges in other contexts is structural error. See, e.g., U.S. v. McFerron, 163 F.3d 952, 956 (6th Cir. 1998) ("[W[e reject the application of harmless error analysis to the denial of a right to exercise peremptory challenges. This type of error involves a 'structural error,' which is not subject to harmless error analysis. . . . [S]tructural errors, such as the erroneous denial of a peremptory challenge, affect the entire conduct of the trial from beginning to end." (internal quotation marks omitted)). The same standard should be applied here, when

the denial of peremptory challenges, though not explicit, has the same effect.

In State v. Mootz, the Iowa Supreme Court held that Rule 2.18(9) requires reversal where the district court erroneously denies a peremptory strike resulting from a reverse *Batson* challenge. Mootz, 808 N.W.2d at 226. While Mootz rested on different grounds, the decision called into question the validity of existing Iowa precedent on the issue of "forced" peremptory strikes. In his special concurrence in Mootz, Justice Wiggins opined that forcing a defendant to utilize a peremptory strike where a for-cause challenge should have undoubtedly been sustained *always* results in prejudice, and suggests that this Court do away with the unduly burdensome Neuendorf rule. Mootz, 808 N.W.2d at 226 (Wiggins, J., concurring specially). Justice Wiggins concluded that the "logical extension" of finding error where a district court allows a juror to remain on the jury panel who should have been struck is to presume prejudice, and stated that Neuendorf was wrongly decided. Id.

Notably, other courts, including the United States Supreme Court interpreting and applying federal law in this

context, have disagreed. In U.S. v. Martinez-Salazar, the United State Supreme Court made clear that, under federal law, "if the defendant elects to cure such an error by exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any rule-based or constitutional right." Martinez-Salazar, 528 U.S. 304, 307, 120 S.Ct. 774, 777, 145 L.Ed.2d 792 (2000).

However, this Court is under no duty to track federal law on issues raised under Iowa law, and may in fact agree with many states that have rejected the Supreme Court's standard on state-law grounds. See, e.g., Busby v. State, 894 So.2d 88, 103 (Fla. 2004) ("[T]he curative use of a peremptory challenge violates a defendant's right to a trial by impartial jury when that defendant can show that he or she went without the

peremptories needed to strike a seated juror.")[1]; Johnson v. State, 43 S.W.3d 1, 5–7 (Ct. Crim. App. Tex. 2001) (rejecting *Ross* on state law grounds); State v. Ball, 824 So.2d 1089, 1102, n. 9 (La. 2002) (reiterating that "[p]rejudice is presumed by a trial judge when a challenge for cause is denied erroneously by a trial court and the defendant ultimately exhausts his peremptory challenges," and recognizing its divergence from the federal rule.); State v. Taylor, 875 So.2d 58, 62 (La. 2004) ("Prejudice is presumed when a defendant's challenge for cause is erroneously denied and the defendant exhausts all his peremptory challenges. An erroneous ruling depriving an accused of a peremptory challenge violates his substantial rights and constitutes reversible error." (internal citations omitted)); Fortson v. State, 587 S.E.2d 39, 41 (Ga. 2003) ("[T]his Court has recognized that causing a defendant to unnecessarily use a peremptory strike on a juror that

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[1] Importantly, the Busby court did not require a showing that a biased juror was actually seated on the final panel, disagreeing with Ross v. Oklahoma, 487 U.S. 81, 109 S.Ct. 2273, 101 L.Ed.2d 80 (1988); rather, it was enough that the defendant was forced to use a "curative" peremptory strike that deprived him of an additional strike he would have used otherwise. *See* Busby, 894 So.2d at 103.

should have been excused for cause is per se harmful error."); Green, 652 N.E.2d at 776 ("[T]he erroneous disallowance of a peremptory challenge is reversible error without a showing of prejudice.").

In the 1993 case Thomas v. Com., the Kentucky Supreme Court held that prejudice was presumed and reversal was mandatory when the defendant was forced to use a peremptory strike on a juror that should have been struck for cause, concluding that the defendant was ultimately deprived of his ability to exercise all of his peremptory challenges. Thomas, 864 S.W.2d 252, 260 (Ky. 1993), *overruled by* Morgan v. Com., 189 S.W.3d 99 (Ky. 2006), *overruled by* Shane v. Com., 243 S.W.3d 336 (Ky. 2007). Not long after, in 2006, the Kentucky Supreme Court overruled Thomas and adopted a harmless-error test under these circumstances because the challenged juror did not end up on the actual jury, concluding that reversal on this principal alone "would be absurd." Morgan, 189 S.W.3d at 107, *overruled by* Shane, 243 S.W.3d 336.

One year later the Kentucky Supreme Court recognized its error and quickly reversed course yet again, returning to the Thomas standard and overruling Morgan. Shane, 243 S.W.3d at 341. The Shane court reasoned that "[w]hen a juror is not properly struck for cause, without peremptory strikes, a defendant would find himself forced into an unfair trial. The substantial nature of a peremptory strike is thus obvious in this context." Id. The Shane court, in quite simple terms, identified the fundamental unfairness and inequity inherent applying a harmless-error analysis in this context:

> Here, the defendant was tried by a jury that was obtained by forcing him to forgo a different peremptory strike he was entitled to make. If he had been allowed that strike, he may well have struck one of the jurors who actually sat on the jury. He came into the trial expecting to be able to remove jurors that made him uncomfortable in any way except in violation of Batson v. Kentucky; this was a right given to him by law and rule. Depriving him of that right so taints the equity of the proceedings that no jury selected from that venire could result in a fair trial. No jury so obtained can be presumed to be a fair one.

Id. at 340.

The court then entertained the question of whether peremptory strikes are as "substantial" when "not being

exercised to prevent a *known* unfairness." Id. The court responded in the affirmative:

> Given that [w]hen the right of challenge is lost or impaired, the statutory conditions and terms for setting up an authorized jury are not met; the right to challenge a given number of jurors without showing cause is one of the most important rights of a litigant—the obvious answer, long supported in our law, is yes.

Id. (internal citation and quotation marks omitted).

Iowa Rule of Criminal Procedure 2.18(9) requires that both parties exercise ten peremptory strikes to arrive at a twelve-person jury. Here, trial counsel was forced to exercise all ten strikes, including one against a juror who should have been struck for cause. The logical and equitable approach as identified by the Shane court and several others across the country is to presume prejudice under these circumstances.

Depriving defendants of peremptory strikes due to the errors of the court is unjust and necessarily results in prejudice. Forcing trial counsel to eliminate jurors through the use of peremptory strikes who should have been struck for cause resulted in a structural error in the proceedings in violation of Iowa Rule of Criminal Procedure 2.18(9), and as

such, reversal is required. Stephen Jonas respectfully requests that this Court vacate his judgment and sentence, reverse his conviction for Murder in the Second Degree, and remand this case to the district court for retrial.

II. THE EVIDENCE WAS INSUFFICIENT TO CONVICT STEPHEN JONAS OF THE CHARGE OF MURDER IN THE FIRST DEGREE.

A. Error Preservation:

At the close of the State's presentation of evidence, defendant moved for a motion for judgment of acquittal pursuant to Iowa Rule of Criminal Procedure 2.19(8). (Tr. p. 1255 Line 5 – p. 1262 Line 20).

B. Standard of Review:

Our standard of review in a sufficiency of the evidence challenge is for errors at law. State v. Spies, 672 N.W. 2d 792, 796 (Iowa 2003).

The district court's finding of guilt is binding upon us unless we find there was not substantial evidence in the record to support such a finding. In determining whether there was substantial evidence, we review the record evidence in the light most favorable to the State. Substantial evidence means

such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. State v. Sutton, 636 N.W.2d 107, 110 (Iowa 2001) (quoting State v. Torres, 495 N.W.2d 678, 681 (Iowa 1993)). In reviewing the record evidence in the light most favorable to the State, "we must consider all the record evidence, not just the evidence supporting guilt." Id.

C. Argument:

Defendant argued that the evidence submitted did not support a finding that he had the requisite intent and that his actions were justified. (Tr. p. 1255 Line 5 – p. 1262 Line 20). The court denied defendant's motion. (Tr. p. 1255 Line 5 - p. 1262 Line 20). At the close of all of the evidence, defendant renewed his motion for judgment of acquittal pursuant to Iowa Rule of Criminal Procedure 2.19(8). (Tr. p. 1561 Lines 6-23). It is settled law Murder in the Second Degree is a general intent crime only requiring proof of malice aforethought rather than a specific intent to kill. State v. Lyman, 776 N.W.2d 865, 877 (Iowa 2010). "Malice aforethought is a fixed purpose or design to do physical harm to another that exists before the

act is committed." State v. Myers, 653 N.W.2d 574, 579 (Iowa 2002). It does not need to exist for any particular length of time; it is sufficient if the purpose was formed and continued to exist at the time the act was committed. Reeves, 670 N.W.2d at 207. "Because this element is a state of mind, circumstantial evidence is generally used to prove malice." State v. Buenaventura, 660 N.W.2d 38, 49 (Iowa 2003).

The relationship between the state of mind, malice aforethought, and the homicidal act "is more accurately characterized as a causal relationship than as a temporal relationship." State v. Bentley, 757 N.W.2d 257, 265 (Iowa 2008). "In other words, the malice must result in the homicidal act." *Id.* "The law allows a presumption of malice aforethought from the use of a deadly weapon in the absence of evidence to the contrary." *Id.* One such explanation to the contrary is showing a legal excuse such as self-defense. State v. McNamara, 252 Iowa 19, 25, 104 N.W.2d 568, 572 (1960). In addition, although "motive for the killing is not a necessary element of second-degree murder, absence of such motive may

be considered on the question whether the defendant acted with malice aforethought." Reeves, 670 N.W.2d at 207.

Defendant argued that the evidence submitted did not support a finding that he acted with malice aforethought. Defendant also argued the State failed to prove beyond a reasonable doubt that he did not act with justification. "A person is justified in the use of reasonable force when the person reasonably believes that such force is necessary to defend oneself ... from any imminent use of unlawful force." Iowa Code § 704.3.

However, the State may rebut this defense if it proves beyond a reasonable doubt that the person was not justified in his or her actions. See State v. Begey, 672 N.W.2d 747, 752 (Iowa 2003). Specifically, a defendant's actions are not justified if the State proves any one of the following elements, including that the defendant: had available an alternative course of action; did not believe he was in imminent danger of death or injury and the use of force was not necessary to save him; did not have reasonable grounds for the belief; or used unreasonable force. See State v. Shanahan, 712 N.W.2d 121,

134 (Iowa 2006). Like recklessness, the determination of whether a defendant's actions were justified is a question for the jury. See State v. Lawler, 571 N.W.2d 486, 489–90 (Iowa 1997); State v. Beyer, 258 N.W.2d 353, 357 (Iowa 1977).

Zachery Paulsen struck Stephen Jonas on the face with a ball-peen hammer with enough force that it knocked Stephen onto the ground. (Tr. p. 1420 Line 16 - p. 1421 Line 17). Zachery continued his attack on Stephen, whom having no way to escape and fearing for his life, was left with no choice but to defend himself. (Tr. p. 1421 Line 19 - p. 1425 Line 8). A pathologist called by the defense testified that a hammer blow can and does result in death. (Tr. p. 1313 Line 25 - p. 1316 Line 21). Stephen's use of force was necessary to avoid injury or risk to his life or safety.

This Court should conclude there was substantial evidence supporting a finding of justification. The jury could reasonably conclude the killing was justified because there was proof defendant did not continue the incident, but rather was scared and protecting himself from being physically assaulted. There was no alternative course of action available

to defendant. Defendant believed he was in imminent danger of death or injury and the use of force was necessary to prevent his death or injury. The force used by defendant was reasonable.

A careful review of the record, taken in the light most favorable to the State, does not allow a reasonable fact finder to conclude there is sufficient evidence to prove defendant committed the Murder in the Second Degree charge. Defendant did not have malice aforethought and was justified in his actions. Therefore, the Court should reverse the judgment of the district court, and remand for an entry of an order dismissing the charge.

Ineffective Assistance of Counsel. In the event this Court finds error was not preserved on this issue for any reason, defendant argues trial counsel ineffective under both the United States and Iowa Constitutions for failing to preserve error. U.S. Const. amends. VI, XIV; Iowa Const. art. I § 10. The benchmark for judging any claim of ineffective assistance of counsel must be whether counsel's conduct so undermined the proper functioning of the adversarial process

that the trial cannot be relied on as having produced a just result. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

To prevail on a claim of ineffective assistance of counsel, the defendant has the burden to show "(1) the attorney failed to perform an essential duty and (2) prejudice resulted." State v. Shanahan, 712 N.W.2d 121, 136 (Iowa 2006). Both elements must be proven by a preponderance of the evidence. State v. Oetken, 613 N.W.2d 679, 683 (Iowa 2000). However, both elements do not always need to be addressed. Ledezma v. State, 626 N.W.2d 134, 142 (Iowa 2001). If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently. Id.

To prove counsel failed in an essential duty, the defendant must prove the attorney's performance was outside the range of normal competency. Burgess v. State, 585 N.W.2d 846, 847 (Iowa Ct. App. 1998). Counsel's performance is "measured against the standard of reasonably competent practitioner with the presumption that attorney performed his duties in a competent manner." State v. Begey, 672 N.W.2d

747, 749 (Iowa 2003). Generally, "ineffective assistance is more likely to be established when the alleged actions or inactions of counsel are attributed to a lack of diligence as opposed to the exercise of judgment." Ledezma, 626 N.W.2d at 142. "[M]ere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel." Id. at 143.

The test for prejudice is whether counsel's failure worked to the defendant's actual and substantial disadvantage so that a reasonable probability exists that, but for the trial attorney's unprofessional errors, the results of the proceedings would have been different. Shanahan, 712 N.W.2d at 136. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. "In determining whether this standard has been met, we must consider the totality of the evidence, what factual findings would have been affected by counsel's errors, and whether the effect was pervasive or isolated and trivial." State v. Graves, 668 N.W.2d 860, 882-83 (Iowa 2003).

If trial counsel did not preserve error on this issue, defendant was prejudiced by trial counsel's breach of duty. The evidence was not sufficient to support the jury's guilty verdict for the Murder in the Second Degree charge as discussed above. Defendant is entitled to have his conviction vacated.

III. DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION TEN OF THE IOWA CONSTITUTION WHEN TRIAL COUNSEL FAILED TO OBJECT TO PROSECUTORIAL MISCONDUCT.

A. Preservation of Error:

Appellate review is not precluded if failure to preserve error results from a denial of effective assistance of counsel. State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

B. Scope of Review:

When a defendant asserts a constitutional violation, the reviewing court makes an independent evaluation of the totality of the circumstances, which is the equivalent of a de

novo review. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

C Argument:

A convicted defendant's claim that counsel's assistance was so defective under the Sixth and Fourteenth Amendments to the United States Constitution as to require reversal of a conviction has two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 693 (1984).

A convicted defendant making a claim of ineffective assistance of counsel must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. Id. at 690, 104 S.Ct. at

2066, 80 L.Ed.2d at 695. The defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. Stephen Jonas asserts that his trial counsel was ineffective for failing to object to repeated prosecutorial misconduct.

A prosecutor is not an advocate in the normal meaning of the word. State v. Graves, 668 N.W.2d 860, 870 (Iowa 2003). Aside from having a duty to the public, a prosecutor also has a duty to the defendant to ensure a fair trial by complying with the requirements of due process throughout. Id. A prosecutor's primary objective should "be to see that justice is done, not to obtain a conviction." Id. In making closing arguments, a prosecutor is entitled to some latitude when analyzing the evidence admitted during the trial. State v. Phillips, 226 N.W.2d 16, 19 (Iowa 1975). The prosecutor is allowed to draw conclusions and argue permissible inferences that may be reasonably derived from the evidence. Thornton,

498 N.W.2d at 676. The prosecutor cannot, however, assert a personal opinion or create evidence. State v. Odem, 322 N.W.2d 43, 47 (Iowa 1982).

"The initial requirement for a due process claim based on prosecutorial misconduct is proof of misconduct." Id. at 869. Evidence of the prosecutor's bad faith is not necessary. Id. The second requirement is that the misconduct resulted in prejudice to the extent the defendant was denied a fair trial. Id. A prosecutor's argument must be confined to evidence in the record and must not include inflammatory or prejudicial statements regarding a defendant in a criminal matter. Id.

Witness credibility is a proper subject for discussion in closing argument. State v. Martens, 521 N.W.2d 768, 772 (Iowa Ct. App. 1994). Even so, a prosecutor may not express or suggest his or her personal belief as to the truthfulness or falsity of a witness' testimony. Id. State v. Williams, 334 N.W.2d 742, 744 (Iowa 1983). A prosecutor also has a duty to refrain from undue denunciations and inflammatory utterances. State v. Graves, 668 N.W.2d 860, 874 (Iowa 2003).

During closing arguments, the prosecutor made the following remark:

> Whether – and this verdict has to be – send a message that you can't kill someone like this. Just a checkmark.

(Tr. p. 1588 Lines 20-22).

Defendant did object to this statement, but no request was made to the court that the jury be instructed to disregard the prosecution's statement. (Tr. p. 1589 Lines 1-4, Motion for New Trial, Sent. Tr. p. 16 Line 19 – p. 18 Line 1) (App. pp. 23-28). The prosecutor's comment improperly urged the jurors to convict the defendant in order to protect community values and prevent further criminal activity. It was an improper emotional appeal designed to persuade the jury to decide the case on issues other than the facts before it. See United States v. Johnson, 968 F.2d 768, 770–71 (8th Cir.1992).

The prosecutor also made the following remarks during closing arguments:

> I'm going to tell you one thing, though. This whole argument that was made today to you about – on behalf of Mr. Jonas all hinges on his testimony. That's all it is and nothing else to corroborate it.

And you know that you are the judges of credibility; you know that. And he is not credible.

And why do we know that? Because if you look at what he did and what he did afterwards – they don't want you to look at things before or after. They just want to isolate a period of time, but that's not the way it works. That's not the way it works. If someone is truthful about what happened – remembered we talked in voir dire – the truth doesn't change. The truth is the truth.

If it is as he said, he would have been shouting it out. He would have been telling those police officers the first time he talked to them, he, I got into a situation; I had to defend myself. That's not what this is about.

(Tr. p. 1635 Lines 6 – 24)

And that's what the evidence is in this record. And it's much more credible than him. Much more credible than him. And you get to make those choices. You can believe all, part, or none of someone's story.

(Tr. p. 1637 Lines 20-23).

And how about conveniently changing the shoes? And this goes to credibility as well. Remember that, those were the 13s that were tight on his feet. He wears 14s. he came in here and told you that thinking he's going to slip it by you; right? But when we pulled out the inventory and read the shoes that were taken from his duplex, those white shoes weren't in there and all the other things were size 13s. Trying to pull a fast one on you; didn't think we'd catch it, but we caught it.

And the point is the credibility, and you get to judge it. If you are going to lie about – make a – say

an untruth about something minor like that, you are certainly going to do it about something big.

Now what happened down there, you can't rely on him because he's casting it in his own light. But what we do know is this: His claim that he's doing this (indicating) and he's fending off this, and Zach is with the hammer – look at this hammer. There aren't any strikes on here from a knife. There aren't any strikes on the head with a knife at all, nothing, if he's up there doing this. (Indicating).

(Tr. p. 1638 Line 6 – p. 1389 Line 2).

Now, ladies and gentlemen, here is the other thing that just tells you he's not being truthful with you about what happened down there.

(Tr. p. 1640 Lines 5-7).

And the reason he's making it up is he knows what he did. And how do we know he's making it up? You look at it.

(Tr. p. 1642 Lines 7-9).

This person has no credibility. That's all their argument is based on; Stephen Jonas.

(Tr. p. 1645 Line 24 – p. 1646 Line 1).

With the exception of the "send a message" remark, none of these statements by the prosecution were met with an objection by the defense. The State relied on inappropriate and disparaging themes to undermine Jonas's credibility. It would be a reasonable strategy for

the prosecutor to point out the differences in defendant's testimony and his statements to police. The specific references by the prosecutor quoted above, however, tended to reflect his personal opinion and unfairly disparaged Jonas. The remarks were repeated throughout closing arguments in an effort to improperly sway the jury.

Even if a prosecutor engages in misconduct, this fact alone does not automatically prejudice a defendant's right to a fair trial. State v. Graves, 668 N.W.2d 860, 869 (Iowa 2003). The appellate courts will consider: "(1) the severity and pervasiveness of the misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence; (4) the use of cautionary instructions or other curative measures; and (5) the extent to which the defense invited the misconduct." Id. at 877.

An attorney for the State is under a duty to ensure both the State and the defendant receive a fair trial. State v. Tate, 341 N.W.2d 63, 65 (Iowa Ct.App.1983) (emphasis added). The prosecutor's job is not simply to secure convictions. State v.

Webb, 244 N.W.2d 332, 333 (Iowa 1976). "It is central to our system of jurisprudence that a defendant must be convicted only if it is proved he committed the offense charged and not because he is a bad man." State v. Johnson, 222 N.W.2d 483, 488 (Iowa 1974).

Prosecutorial misconduct warrants a new trial when it is so "prejudicial as to deprive the defendant of a fair trial." State v. Escobedo, 573 N.W.2d 271, 277 (Iowa Ct.App.1997) (quoting State v. Lyons, 210 N.W.2d 543, 549 (Iowa 1973)). In determining whether such impropriety is a basis for reversal, it is highly relevant if the conduct was isolated and inadvertent or widespread and deliberate. State v. Greene, 592 N.W.2d 24, 32 (Iowa 1999).

The United States Supreme Court has also discussed the role of prosecuting attorneys and their concomitant obligations as follows:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he in a peculiar and very definite sense is the servant of the

> law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314, 1321 (1935).

The prosecutorial misconduct that occurred in this case was pervasive. These were not isolated remarks, but themes repeated for emphasis and effect. The misconduct at issue centered on Jonas's credibility. The State's case concerning the issue of justification was particularly weak.

The District Court did instruct the jury that the arguments and questions of counsel were not evidence. (Inst. No. 11) (Supp. App. p. 3). This was a routine instruction, and the court took no additional curative measures because defense counsel did not object to the misconduct. State v. Graves, 668 N.W.2d 860, 878 (Iowa 2003).

The repetitive nature of the prosecutor's misconduct in this case amounted to a due process violation and trial

counsel breached an essential duty in failing to object to the misconduct. The issue of prosecutorial misconduct has merit and there was no strategic reason for ignoring it. Furthermore, this was repeated conduct the jury was unlikely to overlook.

Stephen Jonas was prejudiced by trial counsel's failure to object to the State's misconduct. The arguments outlined above regarding the prejudicial nature of the State's misconduct are equally applicable to the prejudice component of Jonas's ineffective assistance claim. Id. at 883. The State's misconduct was reasonably likely to sway the outcome of the trial.

Stephen Jonas respectfully requests this Court reverse his conviction, judgment, and sentence and remand his case to the District Court for a new trial.

CONCLUSION

For all of the reasons discussed in above, Stephen Jonas respectfully requests the Court conclude the evidence was insufficient to convict him of Murder in the Second Degree, and the Court should reverse the judgment of the district

court, and remand for an entry of an order dismissing the charge. Alternatively, defendant's conviction should be reversed and the case be remanded for a new trial

NONORAL SUBMISSION

Counsel for Defendant-Appellant, Stephen Robert Jonas, requests not to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

I, the undersigned, hereby certify that the true costs of producing the necessary copies of the foregoing Brief and Argument was $ 5.38, and that amount has been paid in full by the Office of the Appellate Defender.

Respectfully submitted,

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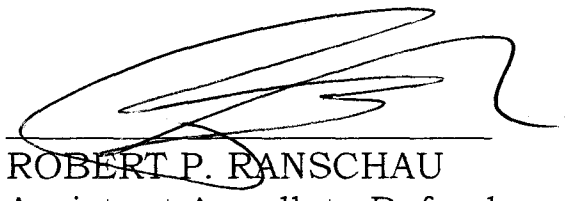

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